BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRIAN CHARLES EBERSPACHER	)	
Claimant	)	
VS.	)	
	)	
WEND-WOOD, INC.	)	
Respondent	)	
AND	)	Docket No. 1,016,215
	)	
WESTPORT INSURANCE CORPORATION	)	
VIRGINIA SURETY COMPANY, INC.	)	
LIBERTY INSURANCE COMPANY	)	
Insurance Carriers	)	

ORDER

Respondent and one of its insurance carriers, Westport Insurance Corporation (Westport), appealed the January 20, 2005 preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark.

ISSUES

The ALJ found claimant suffered personal injury by accident to his left shoulder on February 18, 2004, that the accident arose out of and in the course of claimant's employment with respondent and that all benefits should be assessed against Westport. By implication, the ALJ also found timely notice of accident was provided by claimant to respondent.

On appeal, respondent and Westport raise issues as to whether claimant gave timely notice of accident and whether the ALJ exceeded his jurisdiction in assessing benefits against Westport for a date of accident outside of its coverage period.

Respondent and Liberty Insurance Company (Liberty) agree with Westport that claimant failed to provide timely notice or prove that there was just cause for his failure to give timely notice. However, Liberty argues that "if the Board finds that notice was appropriate due to the injury being repetitive in nature, the Order should have been against the current carrier, St. Paul-Travelers Insurance Company (Travelers Indemnity Insurance Company)."[1]

[1] Brief of Appelee [sic] Wend-Wood and Liberty Mutual Insurance at 1 (filed March 7, 2005).

Travelers Insurance Company (Travelers) was not separately represented at the January 20, 2005 preliminary hearing. Nevertheless, a brief was filed with the Board on behalf of Travelers noting that its workers compensation insurance coverage for respondent began on January 1, 2005. "Thus, the only way that Travelers could be assessed with responsibility for benefits in this matter would be if the accident date were changed so that it fell within Travelers' coverage period. However, the Board has held on several occasions that a determination of the date of accident is not a jurisdictional issue subject to preliminary hearing review. (Citations omitted)"[2]

Counsel for claimant did not file a brief with the Board. Therefore, claimant's position with regard to this appeal is not known. Presumably, claimant would ask the Board to affirm the ALJ's Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant filed an Application for Hearing on April 6, 2004, alleging a series of accidents beginning December 5, 2002 "and each and everyday thereafter[.]"[3] Claimant alleged that as a result of "heavy lifting of work material" he "initially injured right shoulder from repetitive lifting and subsequently injured left shoulder from repetitive lifting, overuse and compensating for right shoulder."[4] Thereafter, an Amended Application for Hearing was filed on September 17, 2004, alleging accident dates for both right and left shoulder injuries of; "[r]ight shoulder-12-5-02 and each & everyday thereafter, left shoulder-2-18-04 and each & everyday thereafter."[5]

There are several insurance carriers involved in this claim because claimant alleged an ongoing series of accidents and because respondent has changed workers compensation insurance carriers several times. The various carriers and their periods of coverage are as follows:

Virginia Surety Co.	January 1, 2001 through December 31, 2002
Westport Insurance Corp.	January 1, 2003 through December 31, 2003
Liberty Insurance Co.	January 1, 2004 through December 31, 2004
Travelers Ins. Co.	January 1, 2005 to present

On January 19, 2005, the parties entered into a Joint Stipulation for Dismissal of Virginia Surety Company, Inc., and an Order Dismissing Virginia Surety Company Inc., From Claim was entered by the ALJ on January 20, 2005.

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[2] Brief of Travelers Insurance Company at 1 (filed March 8, 2005).

[3] K-WC E-1 Application for Hearing (filed April 6, 2004).

[4] *Id.*

[5] K-WC E-1 Amended Application for Hearing (filed Sept. 17, 2004).

The primary issue at the preliminary hearing and on appeal is which insurance carrier is responsible for the cost of providing medical treatment for claimant's left shoulder. This dispute would be resolved by determining the appropriate date of accident. But that is not an issue listed in K.S.A. 44-534a as jurisdictional and does not otherwise raise an issue that the ALJ exceeded his jurisdiction.[6] Clearly, the ALJ did not exceed his jurisdiction.

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.[7]

The Board is unaware of any provision in the Workers Compensation Act that purports to give the Board jurisdiction to review a preliminary hearing order for redetermining the liability among multiple insurance carriers. The Board was presented with a similar issue in *Ireland*[8] where, in holding that the Board was without jurisdiction to consider the issue of which insurance carrier should pay for preliminary hearing benefits, the Board said:

> Furthermore, it is inconsistent with the intent of the Workers Compensation Act for a respondent to delay preliminary hearing benefits to an injured employee while its insurance carriers litigate their respective liability. The employee is not concerned with questions concerning this responsibility for payment once the respondent's general liability under the Act has been acknowledged or established.[9]

However, the issue of notice is considered jurisdictional by K.S.A. 44-534a. And because a determination of a date of accident is necessary in order to resolve the issue of notice, the Board will address the question of claimant's accident date or dates to the extent it is necessary to determine the notice issue.

K.S.A. 44-520 requires a claimant provide notice of a work-related accident to his or her employer within ten (10) days of the date of the accident. The notice must state the time, place and particulars of the accident so as to alert the respondent to the possible work connection to the injury and the potential for a claim.[10] That same statute permits the

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[6] K.S.A. 44-551(b)(2)(A); *See Carpenter v. National Filter Service,* 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

[7] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

[8] *Ireland v. Ireland Court Reporting*, Nos. 176,441 & 234,974, 2002 WL 985408 (Kan. WCAB Feb. 1999).

[9] *See Kuhn v. Grant County*, 201 Kan. 163, 439 P.2d 155 (1968); *Hobelman v. Krebs Construction Co.,* 188 Kan. 825, 366 P.2d 270 (1961).

[10] *See e.g., Pike v. Gas Service Co.,* 223 Kan. 408, 573 P.2d 1055 (1978).

reporting period to be extended when the employee has "just cause" for not reporting the accident in a timely manner.

Although not intended as an exhaustive list, some of the factors to consider in determining whether "just cause" exists are:

(1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually.
(2) Whether the employee is aware he or she has sustained either an accident or an injury on the job.
(3) The nature and history of claimant's symptoms.
(4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident, and whether the respondent has posted notice as required by K.A.R. 51-12-2.

When just cause is an issue, the above factors should be considered but each case must be determined on its own facts. If the Board finds persuasive evidence establishing just cause for failing to report the accident within the ten-day period contained in K.S.A. 44-520, then the time for giving respondent notice of accident would be extended to 75 days. There is no doubt that claimant gave notice of his left upper extremity injury on March 15, 2004, less than 75 days from the onset of his left upper extremity symptoms.

Claimant alleges injuries to both his upper extremities, but the symptoms did not occur simultaneously. Claimant first injured his right upper extremity, was placed on restrictions and given light duty work by respondent. Thereafter, claimant began experiencing symptoms in his left upper extremity.

The compensability of claimant's right upper extremity injury is not disputed. Furthermore, Westport did not dispute the compensability of the left shoulder injury at the preliminary hearing. Rather, Westport's position was that it was not responsible for that injury based upon it not providing respondent's insurance coverage for the dates of accident alleged by claimant for the left shoulder injury. It was counsel for Liberty that raised issues concerning compensability, including whether claimant suffered accident to his left shoulder arising out of and in the course of his employment.

> The Court: Does respondent admit a right shoulder injury, but deny a left shoulder injury, is that the issue?
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> Mr. Schaefer: Well, I don't know if that's quite the issue. The right shoulder has been accepted and benefits have been provided by Westport Insurance. As far as the left shoulder injury Westport Insurance would deny any responsibility.
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> The Court: All right.

> Mr. Emerson: And, Judge, we are denying causation, arising out of as well as injury on the date. He was an employee and has been an employee of Wend-Wood throughout the calendar year of 2004 and 2003 and into 2005. We are covered by the Act. And I did outline who the insurers were.[11]

At the conclusion of the preliminary hearing, after the two (2) witnesses had finished testifying, counsel for Liberty also raised the issue of timely notice. Nevertheless, the primary issue continued to be date of accident for purposes of determining which insurance carrier was liable.

> Mr. Emerson: Judge, I think the evidence shows, well, I guess I need clarification, this is, I believe is being pled as a repetitive - use case and if so if any medical evidence or medical treatment is to be provided it would be on the current insurer. There is a lack of notice on an acute injury and I believe it's being sought as a repetitive case now. So as for my coverage period my carrier doesn't have liability because we are not on the risk any longer.
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> Mr. Schaefer: Your Honor, I just will point to the point that Westport covered it in 2003, there is no allegation that any of these symptoms occurred prior to 2004, Westport wasn't on coverage at that time and would argue that the responsibility is with the subsequent carriers, most likely the present carrier at this time. Thank you.
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> The Court: Thank you, gentlemen, I will get an order out in the next day or two.[12]

Claimant underwent arthroscopic surgery to his right shoulder on November 19, 2003. Thereafter, he returned to work with his right shoulder in a sling and a two-pound weight restriction issued by the treating orthopedic surgeon, Dr. Bernard F. Hearon.[13] Both claimant and Daryl Markel, president and co-owner of respondent, testified that claimant was given light duty work. Claimant described his job as mostly supervisory whereas Mr. Markel indicated that when claimant first came back after surgery he had him doing mostly "gopher work," meaning pick-up and deliveries but where somebody else would do the lifting.[14] On February 18, 2004, claimant was sent to a job site that had a problem with some adjustable shelves. Claimant said he had to move shelves around and this is when his left shoulder began getting sore. He initially thought it was a sore muscle but thereafter it got progressively worse despite his light duty work status.

Claimant underwent an independent medical evaluation at the request of his attorney with Pedo A. Murati, M.D., on June 28, 2004. Dr. Murati obtained a history from claimant that

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[11] P.H. Trans. at 5.

[12] *Id.* at 29-30.

[13] *Id.* at 12; Resp. Ex. 5.

[14] *Id.* at 23.

described his left arm symptoms as resulting from his over compensation for his injured right arm. "The patient states that as a result of his right shoulder restriction, he began to use his left arm more and began to experience left shoulder pain."[15] Dr. Murati diagnosed "[l]eft shoulder pain secondary to probable rotator cuff tear, not at maximum medical improvement." And [m]yofascial pain syndrome affecting the left shoulder girdle, not at maximum medical improvement."[16]

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson,*[17] the Court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus ¶ 1).

However, the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*,[18] the Court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*,[19] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

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[15] *Id.*, Cl. Ex. 1.

[16] *Id.*, Cl. Ex. 1 at 2.

[17] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[18] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[19] *Gillig v. Cities Service Gas Co.,* 222 Kan. 369, 564 P.2d 548 (1977).

In *Graber*,[20] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved torn knee cartilage which had never properly healed. *Stockman,* on the other hand, involved a distinct reinjury of a back sprain that had subsided. The Court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."

Based on the record compiled to date, the Board finds that claimant's left shoulder injury occurred as a direct and natural consequence of his right shoulder injury. As timely notice was given for the right upper extremity injury and the right upper extremity has been accepted as compensable, additional notice for the left upper extremity is not required.[21]

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the January 20, 2005 Order entered by Administrative Law Judge John D. Clark is modified as to the date of accident, but is otherwise affirmed.

IT IS SO ORDERED.

Dated this ____ day of May, 2005.

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BOARD MEMBER

c: Christopher A. Randall, Attorney for Claimant
John R. Emerson, Attorney for Respondent and Liberty Insurance Company
Vincent A. Burnett and Matthew J. Schaefer, Attorneys for Respondent and Westport Insurance Corporation
Jeff S. Bloskey, Attorney for Respondent and Virginia Surety Company, Inc.
Lyndon W. Vix, Attorney for Respondent and Travelers Insurance Company
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[20] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[21] *Frazier v. Midwest Painting, Inc.*, 268 Kan. 353, 995 P.2d 855 (2000).